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## Professional Responsibility

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I. INTRODUCTION

The prudent practitioner will note a number of changes, some of them quite substantial, to Florida's professional responsibility landscape in 1996.<sup>1</sup> Courts and ethics committees rendered decisions affecting obligations that Florida lawyers assume as they interact with prospective clients, clients, judges, other lawyers, nonlawyer assistants, third parties, and disciplinary authorities. This article examines significant cases and ethics opinions in the

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1. This article surveys professional responsibility developments in Florida from July 15, 1995, through July 14, 1996.

context of the different roles which lawyers assume during the course of their relationships with these individuals and entities.<sup>2</sup>

Part II explores the traditional role of the lawyer as a zealous advocate for the client. This section reviews developments of the past year as they relate to: 1) formation of a lawyer-client relationship; 2) conflicts of interest and other grounds for a lawyer's disqualification from a matter; 3) restrictions on a lawyer's ability to communicate with represented parties; 4) trial conduct, including the permissible scope of argument; and 5) proper termination of a lawyer-client relationship. Part III addresses the lawyer's role as fiduciary, especially with regard to safekeeping of client property. Part IV looks at decisions affecting the lawyer's role as an officer of the court. Part V explores various aspects of a lawyer's role as a businessperson. Included in this section are developments concerning attorney's fees, organization and operation of law firms, a lawyer's relationship with nonlawyers who assist the lawyer in the practice of law, and law firm marketing activities. Finally, Part VI considers the lawyer's role as a member of The Florida Bar, and surveys disciplinary actions taken against Florida lawyers for widely varying conduct.<sup>3</sup>

## II. THE LAWYER AS AN ADVOCATE

Probably the most important role played by a lawyer in our adversary system of justice is that of an advocate who diligently<sup>4</sup> and competently,<sup>5</sup>—in a word zealously<sup>6</sup>—advances the client's cause. Because of the many roles and responsibilities of a lawyer, there are limits placed on the extent of

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2. Cases and ethics opinions are discussed in the section to which they have the most significant connection, rather than in every section where they might apply.

3. Important disciplinary cases are analyzed where appropriate throughout the article, but most are collected in Part VI for the convenience of the reader.

4. FLA. RULES OF PROFESSIONAL CONDUCT (hereinafter "RPC") Rule 4-1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." RPC 4-1.3 (1987). The RPC are found in chapter 4 of the Rules Regulating The Florida Bar.

5. Rule 4-1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." RPC 4-1.1 (1987).

6. Canon 7 of the former Florida Code of Professional Responsibility ("CPR") provided that a lawyer "is to represent a client zealously within the bounds of the law." Effective January 1, 1987, the CPR was superseded by the current RPC. See Florida Bar re Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla.), opinion corrected by 507 So. 2d 1366 (Fla. 1986). The RPC mention "zealous" advocacy only in the Preamble.

a lawyer's advocacy.<sup>7</sup> Sometimes it is difficult to discern the exact point at which one crosses from proper and zealous advocacy, to unethical and over-zealous, advocacy. The Supreme Court of Florida had no such difficulty deciding this issue in *Florida Bar v. Charnock*.<sup>8</sup> There a lawyer represented a Dutch client who owned real property in Florida.<sup>9</sup> A \$3,000 mechanic's lien was filed against one of the client's parcels, which was valued at over \$100,000.<sup>10</sup> The lien holder brought a foreclosure action against the property, but neither the lawyer nor his client were aware of this action because service was effected using the "long arm statute."<sup>11</sup> Judgment was rendered for the lien holder and the property was auctioned at judicial sale.<sup>12</sup> When the lawyer inadvertently learned of this, he filed several motions in an attempt to have the sale set aside.<sup>13</sup> The court denied the motions and issued a writ of possession.<sup>14</sup>

Refusing to give up, the lawyer hastily procured a tenant for the property through an oral agreement.<sup>15</sup> He then had the tenant complete an affidavit averring that the tenant was entitled to have possession of the property, despite the fact that the "tenant" never took possession of the property.<sup>16</sup> The lawyer did this in an effort to take advantage of the protections afforded tenants under Rule 1.580 of the *Florida Rules of Civil Procedure*.<sup>17</sup> The supreme court viewed the lawyer's delaying tactics as an

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7. For example, one of the most obvious limits on zealous advocacy is the prohibition against knowingly using false evidence. Included in this prohibition is perjured testimony, even when such evidence would be extremely helpful to the client's case. See RPC 4-3.3(a) (1987).

8. 661 So. 2d 1207 (Fla. 1995).

9. *Id.* at 1207.

10. *Id.* at 1210.

11. *Id.* at 1208. See also FLA. STAT. § 48.181 (1991). This section is entitled "Service on nonresident engaging in business in state."

12. *Charnock*, 661 So. 2d at 1208.

13. *Id.*

14. *Id.* at 1210.

15. *Id.* at 1208.

16. *Id.*

17. *Charnock*, 661 So. 2d at 1208. The *Florida Rules of Civil Procedure* provide, in relevant part:

Third Party Claims. If a person other than the party against whom the writ of possession is issued is in possession of the property, that person may retain possession of the property by filing with the sheriff an affidavit that the person is entitled to possession of the property, specifying the nature of the claim. Thereupon the sheriff shall desist from enforcing the writ and shall serve a copy of the affidavit on the party causing issuance of the writ of possession. The party causing issuance of the writ may apply to the court for an order directing the

unethical "fraud on the court in an effort to frustrate the transfer of possession of the property" and found that they "went beyond the boundaries of zealous advocacy."<sup>18</sup> The court suspended the lawyer from the practice of law for thirty days.<sup>19</sup>

### A. *Conflicts of Interest and Disqualification*

Although disputes in both the disciplinary and disqualification arenas can turn on the nature of the lawyer's conduct, quite often the determining factor is whether a lawyer-client relationship existed between the lawyer and the allegedly aggrieved party. This issue can be crucial, especially where the facts are otherwise uncontested. For example, in *Florida Bar v. King*<sup>20</sup> the lawyer defended himself against charges of neglect by asserting that a lawyer-client relationship did not exist.<sup>21</sup> He based this on the fact that he was not paid a retainer by the complainant.<sup>22</sup> Rejecting this argument, the supreme court flatly stated that "[a] fee is not necessary to form an attorney-client relationship."<sup>23</sup>

Sometimes actions *not* taken by a lawyer can lead to the conclusion that a lawyer-client relationship exists. In *Florida Bar v. Flowers*,<sup>24</sup> a lawyer who shared office space with a nonlawyer immigration consultant was disciplined for allowing conditions to exist such that persons consulting with the nonlawyer "could reasonably expect and believe that they were receiving legal representation" from the lawyer.<sup>25</sup> It appeared that the lawyer made no effort to distinguish his offices from those of his nonlawyer tenant. This conclusion was supported by the fact that the sign for the office building contained the name and telephone number of only the lawyer.<sup>26</sup>

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sheriff to complete execution of the writ. The court shall determine the right of possession in the property and shall order the sheriff to continue to execute the writ or shall stay execution of the writ, if appropriate.

FLA. R. CIV. P. 1.580(b).

18. *Charnock*, 661 So. 2d at 1209.

19. *Id.* at 1210.

20. 664 So. 2d 925 (Fla. 1995).

21. *Id.* at 926.

22. *Id.*

23. *Id.* at 927 (citing *Dean v. Dean*, 607 So. 2d 494, 500 (Fla. 4th Dist. Ct. App. 1992)).

24. 672 So. 2d 526 (Fla. 1996).

25. *Id.* at 528.

26. *Id.* at 527. Several opinions have been issued for situations where lawyers and non-lawyers share office space. See, e.g., Fla. Bar Comm. on Professional Ethics, Op. 88-15 (1988); Fla. Bar Comm. on Professional Ethics, Op. 78-14 (1978).

The Third District Court of Appeal, in *Garner v. Somberg*,<sup>27</sup> recently decided a highly relevant case concerning the establishment of the lawyer-client relationship. This decision will likely result in changes to the procedures lawyers use to screen potential clients. After Garner's wife was injured in an auto accident, Garner contacted several lawyers about pursuing a personal injury action, and eventually retained a South Florida law firm.<sup>28</sup> The mother of Garner's injured wife, however, hired attorney Somberg.<sup>29</sup> Mr. Somberg then filed a petition to have the wife's competency determined and to have the mother appointed emergency temporary guardian of the wife.<sup>30</sup> Garner moved to disqualify Somberg, alleging that he had previously communicated with Somberg regarding the personal injury action.<sup>31</sup> As a result of these communications, Garner claimed to have given Somberg relevant confidential information.<sup>32</sup> Responding to the motion, sole practitioner Somberg asserted that neither he nor anyone in his office had ever spoken to Garner.<sup>33</sup> Garner, however, produced telephone records showing that he had made three telephone calls to Somberg's office, one lasting thirteen minutes.<sup>34</sup>

Faced with these facts, the trial court denied the motion to disqualify, because Garner failed to demonstrate that he gave confidential information to Somberg during the calls.<sup>35</sup> The appellate court reversed on certiorari review, ruling that the trial court departed from the essential requirements of the law.<sup>36</sup> Citing the supreme court's decision in *State Farm Mutual Automobile Insurance Co. v. K.A.W.*,<sup>37</sup> the court stated, "[i]n conflict-of-interest cases, once an attorney-client relationship is shown to have existed, that relationship gives 'rise to an irrefutable presumption that confidences were disclosed during that relationship . . .'"<sup>38</sup> This statement of law is correct, provided an attorney-client relationship has been shown. The problem in this case was that the court simply assumed, without analysis, the existence

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27. 672 So. 2d 852 (Fla. 3d Dist Ct. App. 1996).

28. *Id.* at 853.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Garner*, 672 So. 2d at 853.

33. *Id.*

34. *Id.*

35. *Id.* at 853-54.

36. *Id.* at 854.

37. 575 So. 2d 630, 633 (Fla. 1991).

38. *Garner*, 672 So. 2d at 854.

of an attorney-client relationship. The court based its decision on telephone records of three apparently short telephone calls. The court's assumption should be disturbing to practicing lawyers. Its holding seems to suggest that anyone who calls a lawyer's office, even if the caller does not speak to a lawyer, or just listens to music while on hold for thirteen minutes, will later be able to disqualify that lawyer. This disqualification will be based on the claim that an attorney-client relationship was formed. Lawyers may be able to guard against disqualification by establishing and following written office procedures for initial client contacts. This can be especially important in areas of law, such as domestic relations, where lawyer-shopping is common. A model procedure would provide that a prospective client first speaks with a nonlawyer, which is usually a secretary or receptionist. Generally, this person takes enough information to run a check for conflicts, but does not discuss details of the matter that would be considered confidences under the ethics rules. Only after the new matter has been cleared by the conflicts check would the lawyer engage in a discussion with the prospective client. If attorney Somberg had been able to show that he routinely followed this type of procedure, perhaps disqualification would have been avoided. While some may consider this type of procedure unduly burdensome, it appears, after *Garner*, that practitioners are left with little or no alternative if they want to avoid being disqualified for a "confidential" conversation that may or may not have taken place.<sup>39</sup>

Turning to more typical matters involving conflicts of interest, the events in *Florida Bar v. Sofo*<sup>40</sup> provide an example of how conflict problems can arise when a lawyer becomes involved in a business transaction with his client.<sup>41</sup> The lawyer was both a shareholder in, and general counsel for Micro Environmental, Inc.<sup>42</sup> The company was subsequently bought by another company.<sup>43</sup> The lawyer then became general counsel for the buyer.<sup>44</sup> The buyer later failed to perform as required under the purchase agreement.<sup>45</sup>

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39. *Id.* Another troubling prospect is the heightened risk of malpractice liability that lawyers face when it becomes so easy for a would-be client to establish the existence of a lawyer-client relationship and its attendant legal duties. See, e.g., *Blackhawk Tennessee, L.P. v. Waltemyer*, 900 F. Supp. 414 (M.D. Fla. 1995).

40. 673 So. 2d 1 (Fla. 1996).

41. *Id.* at 1. See cases cited *infra* notes 317 and 322 and accompanying text (providing other disciplinary cases in which conflicts of interest rules were violated).

42. *Sofo*, 673 So. 2d at 1.

43. *Id.*

44. *Id.*

45. *Id.*

Consequently, Mr. Sofo sent a demand letter to the principals of the buyer, on the buyer's letterhead, and signed as general counsel.<sup>46</sup> After receiving an unsatisfactory response, the lawyer wrote to the principals purporting to terminate the purchase agreement.<sup>47</sup> The supreme court suspended the lawyer from practice for ninety-one days, concluding that he violated several conflict rules.<sup>48</sup> The lawyer's simultaneous representation of buyer and seller violated Rule 4-7.1(b) of the *Florida Rules of Professional Conduct*.<sup>49</sup> This conflict infraction "was exacerbated by [the lawyer's] ownership of stock in both companies."<sup>50</sup> Also violated were rule 4-1.9(a),<sup>51</sup> concerning a lawyer's duty of loyalty to a former client, as well as rules 4-1.9(b),<sup>52</sup> and 4-1.8(b),<sup>53</sup> regarding a lawyer's duty not to misuse client confidences.<sup>54</sup>

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46. *Id.*

47. *Sofo*, 673 So. 2d at 1.

48. *Id.* at 2.

49. Rule 4-1.7(b)(1) provides:

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

RPC 4-1.7(b)(1) (1993).

50. *Sofo*, 673 So. 2d at 2.

51. Rule 4-1.9(a), (b) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

RPC 4-1.9(a)(b) (1993).

52. *Sofo*, 673 So. 2d at 2.

53. *Id.* Rule 4-1.8 (b) provides:

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.

RPC 4-1.8(b) (1987).

54. *Sofo*, 673 So. 2d at 2.



*Lane v. Sarfati*<sup>55</sup> was a case in which a lawyer was disqualified from representation because he violated the duty of loyalty owed to his former client. The lawyer met with an individual who was in the theatrical management business.<sup>56</sup> The lawyer reviewed the standard form contract used by the client and provided her with an addendum to be appended to the standard contract.<sup>57</sup> Sometime later, the lawyer's former client was embroiled in a suit filed against her by one of her actor clients.<sup>58</sup> The suit involved construction of the former client's contract, including the addendum.<sup>59</sup> The lawyer attempted to appear as counsel for the actor in the suit.<sup>60</sup> The trial court denied the former client's motion to disqualify the lawyer, but the appellate court reversed and disqualified the lawyer for breaching rule 4-1.9.<sup>61</sup> The court was of the view that the comment to rule 4-1.9 squarely addressed the situation presented: "[A] lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client."<sup>62</sup>

An interesting issue concerning disqualification of the co-counsel of a client's former law firm was addressed in *Zarco Supply Co. v. Bonnell*.<sup>63</sup> *Zarco* was the latest case to rely on the supreme court's decision in *State Farm Mutual Automobile Insurance Co. v. K.A.W.*<sup>64</sup> to decide the question of standing to raise a lawyer's disqualification motion.<sup>65</sup> In *Zarco*, Stephen Bonnell was involved in an automobile accident.<sup>66</sup> As an employee of the company, he hired a law firm ("Firm I") to pursue a personal injury action against the employer company for himself and several of his family members.<sup>67</sup> Firm I later withdrew from representing all of the family members,

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55. 676 So. 2d 475 (Fla. 3d Dist. Ct. App. 1996).

56. *Id.* at 475.

57. *Id.*

58. *Id.* at 476.

59. *Id.*

60. *Lane*, 676 So. 2d at 476.

61. *Id.*; see *supra* note 51 and accompanying text.

62. *Lane*, 676 So. 2d at 476 (quoting RPC 4-1.9 (1993)).

63. 658 So. 2d 151 (Fla. 1st Dist. Ct. App. 1995).

64. 575 So. 2d 630 (Fla. 1991).

65. *Zarco*, 658 So. 2d at 153. See also *Kenn Air Corp. v. Gainesville-Alachua County Regional Airport Auth.*, 593 So. 2d 1219 (Fla. 1st Dist. Ct. App. 1992). In *Kenn Air*, the court relied on *K.A.W.* in ruling that the successor in interest of a lawyer's former corporate client had standing to raise a motion to disqualify on grounds that the lawyer switched sides in a substantially related matter. *Id.* at 1222.

66. *Zarco*, 658 So. 2d at 152.

67. *Id.*

except the employee's niece, because the employee decided not to sue the employer.<sup>68</sup> Later, Firm I joined as co-counsel with Firm II to pursue the case, with the employer and the employee named as defendants.<sup>69</sup> After the employer filed a motion to disqualify both firms, the employee was dismissed as a party, but expressly consented to Firm I's continued representation, and use of confidences, in the matter.<sup>70</sup> The trial court denied the disqualification motion.<sup>71</sup> Reversing this ruling, the First District Court of Appeal concluded: 1) that the employer had standing to seek disqualification, as a party against whom the confidences could be used; 2) that an unfair informational disadvantage to the detriment of the employer persisted even though Firm I's former client (the employee) was no longer a named party, and thus Firm I was disqualified; and 3) that Firm II was disqualified because the confidential information possessed by Firm I was imputed to Firm II as a result of their co-counsel relationship.<sup>72</sup> Florida case law now clearly indicates that real parties in interest, such as insurers,<sup>73</sup> successors in interest,<sup>74</sup> and civil litigation co-parties,<sup>75</sup> and not just a lawyer's clients, have standing to assert conflict issues in motions to disqualify counsel from a civil suit.

In contrast, standing seems to be more narrowly construed in the criminal defense context. In *Terry v. State*,<sup>76</sup> one of the many issues raised

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Zarco*, 658 So. 2d at 153.

72. *Id.* Although the court cited subdivision (b) of RPC 4-1.10 as support for this third conclusion, it really seemed to be treating the two firms as a single "firm" under subdivision (a) of the rule. Rule 4-1.10(a) and (b) provide:

(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2.

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

RPC 4-1.10(a), (b) (1987).

73. *See State Farm Mutual Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991).

74. *See Kenn Air*, 593 So. 2d at 1219.

75. *See Zarco*, 658 So. 2d at 151.

76. 668 So. 2d 954 (Fla. 1996).

concerned the appellant's claim that he had standing to raise a conflict of interest on behalf of his co-defendant.<sup>77</sup> Noting that the putative conflict was between the co-defendant and the public defender's office, the Supreme Court of Florida rejected this claim, stating that "[n]o authority supports appellant's position that a third party has standing to raise a conflict of interest argument with regard to a codefendant."<sup>78</sup>

Another conflict decision in the criminal law area was *Colton v. State*,<sup>79</sup> which dealt with issues that arose after a lawyer changed employers. The lawyer was employed in the trial section of the public defender's office when a defendant was tried and convicted.<sup>80</sup> The lawyer, however, did not work on the case.<sup>81</sup> The lawyer then moved to the criminal appeals division of the attorney general's office, where he filed an answer brief in the defendant's appeal.<sup>82</sup> Not surprisingly, the defendant moved to disqualify the lawyer, alleging that the lawyer had access to confidential information.<sup>83</sup> The First District Court of Appeal denied the motion to disqualify, stating:

We note that there is no Rule of Professional Conduct which applies to this fact situation. Rule 4-1.10 applies to lawyers moving from one firm to another. Rule 4-1.11 covers successive government and private employment. There is no rule which specifically addresses successive government to government employment when those interests are adverse, as is the case here.<sup>84</sup>

The court reached the correct conclusion, but its statement above is not entirely correct. Although the rules cited by the court do not directly address the matter, the comment to rule 4-1.11 specifically notes that rule 4-1.11 is to

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77. *Id.* at 961. Interestingly, the appellant contended that, in multiple defendant capital cases, it was the policy of the public defender's office to allow the *state attorney's office* to determine which of the defendants would be represented by the public defender and which would be represented by outside conflict counsel. *Id.* at 961 n.7.

78. *Id.* at 961. The supreme court expressly rejected appellant's reliance on the comment to RPC 4-1.7 (1993). "In a criminal case . . . [w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question." *Id.* at 961 n.8.

79. 667 So. 2d 341 (Fla. 1st Dist. Ct. App. 1995).

80. *Id.* at 342.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Colton*, 667 So. 2d at 342-43.

govern this type of situation.<sup>85</sup> The court then concluded that there was no appearance of impropriety in the situation presented because the defendant merely alleged access to confidential information, rather than possession of it.<sup>86</sup> The lawyer had never represented the defendant and trial and appellate representation are of a significantly different nature.<sup>87</sup>

Reasons other than the usual conflict of interest violations were cited as grounds for disqualification in the civil arena. In *Christensen v. Correa*,<sup>88</sup> the Fifth District Court of Appeal appeared to assume the existence of a fiduciary relationship between a suspended lawyer and a lawyer who was appointed to act as “inventory attorney” pursuant to rule 1-3.8.<sup>89</sup> The inventory attorney was appointed to inventory the files of the suspended lawyer, who had misappropriated trust account funds.<sup>90</sup> The suspended lawyer had practiced in a law firm with his brother.<sup>91</sup> The brother later sued a firm client for fees allegedly owed to the firm, and the client engaged the inventory attorney’s law firm as defense counsel.<sup>92</sup> Defense counsel asserted counterclaims of negligence and professional malpractice.<sup>93</sup> The plaintiff moved to disqualify defense counsel, arguing that a conflict of interest was present on the grounds that the inventory attorney owed a fiduciary duty to

85. The comment to rule 4-1.11 provides: “When the client is an agency of one government, the agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.” RPC 4-1.11 cmt. (1987)

86. *Colton*, 667 So. 2d at 343.

87. *Id.*

88. 673 So. 2d 145 (Fla. 5th Dist. Ct. App. 1996).

89. *Id.* at 146. Rule 1-3.8 provides, in part:

(a) Appointment; Grounds; Authority. Whenever an attorney is suspended, disbarred, becomes a delinquent member, abandons a practice, disappears, or dies, and no partner, personal representative, or other responsible party capable of conducting the attorney’s affairs is known to exist, the appropriate circuit court, upon proper proof of the fact, may appoint an attorney or attorneys to inventory the files of the subject attorney and to take such action as seems indicated to protect the interests of clients of the subject attorney, as well as the interest of that attorney.

(b) Maintenance of Attorney-Client Confidences. Any attorney so appointed shall not disclose any information contained in files so inventories without the consent of the client to whom such file relates except as necessary to carry out the order of the court that appointed the attorney to make the inventory.

RPC 1-3.8 (a)–(b) (1995).

90. *Christensen*, 673 So. 2d at 145.

91. *Id.*

92. *Id.*

93. *Id.*

the suspended attorney.<sup>94</sup> The trial court granted the motion and the appellate court affirmed per curiam.<sup>95</sup> A cogent dissent disagreed with the majority's decision, maintaining that the suspended lawyer was not the inventory attorney's "client" and thus, there was no conflict of interest.<sup>96</sup> The dissenting judge opined that, although an inventory attorney "is in a position of trust as to both the suspended attorney and his former clients, the primary fiduciary duty is owed to the former clients who choose to retain the inventory attorney since that is an attorney-client relationship."<sup>97</sup>

Discovery violations have also resulted in disqualification. In *Henriquez v. Temple*,<sup>98</sup> a law firm was disqualified after "one of its attorneys deliberately and surreptitiously obtained documents . . . [that] the trial court had previously ordered were not to be produced."<sup>99</sup>

Finally, over-zealous lawyers who persisted in their attempts to continue representing clients, even after the entry of disqualification orders, faced disciplinary problems.<sup>100</sup> In *Birdsong*, the lawyer was disqualified from representing a client in a civil case for conflict of interest reasons.<sup>101</sup> Notwithstanding the court's order, the lawyer continued to assist the client in that matter behind the scenes by such actions as discussing the case with the client and preparing pleadings.<sup>102</sup> A thirty-day suspension was the end result.<sup>103</sup> In *Florida Bar v. Canto*,<sup>104</sup> more egregious misconduct, by a lawyer who blatantly continued to litigate a case from which he was disqualified several years prior to the disciplinary action, netted the lawyer a two-year suspension.<sup>105</sup>

### B. Communication With Represented Opponents

Florida law concerning the permissible scope of a lawyer's contacts with represented persons continued to develop in 1996. For several years it has been increasingly difficult to definitively determine whether opposing

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94. *Id.*

95. *Christensen*, 673 So. 2d at 145.

96. *Id.* at 146 (Sharp, J., dissenting).

97. *Christensen*, 673 So. 2d at 146.

98. 668 So. 2d 638 (Fla. 3d Dist. Ct. App. 1996).

99. *Id.* at 638.

100. *Florida Bar v. Birdsong*, 661 So. 2d 1199 (Fla. 1995).

101. *Id.* at 1200.

102. *Id.*

103. *Id.* at 1201.

104. 668 So. 2d 583 (Fla. 1996).

105. *Id.* at 584.

counsel may contact *former* employees of a represented corporation and, if so, exactly which former employees are subject to such contact. Rule 4-4.2 precludes a lawyer from contacting someone who is represented by counsel without that counsel's consent.<sup>106</sup> The rule, however, does not expressly define exactly who within the corporate structure is considered to be represented by a corporation's lawyer.<sup>107</sup> The comment to rule 4-4.2 offers guidance concerning *ex parte* communication with *current* officers and employees, but does not answer the former employee question.<sup>108</sup> In 1989, the Florida Bar Board of Governors approved an advisory ethics opinion, which concluded that it was permissible for a lawyer to contact any former officer or employee of a represented corporation without the consent of the

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106. Rule 4-4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

RPC 4-4.2 (1995).

107. *Id.*

108. The comment to rule 4-4.2 provides:

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two (2) organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

RPC 4-4.2 cmt. (1987).

corporation's counsel, unless the person contacted was in fact represented by the corporation's counsel.<sup>109</sup> Opinion 88-14 cautioned that the communicating lawyer was forbidden to inquire into any attorney-client privileged matters.<sup>110</sup>

Throughout the intervening years, courts have given varying degrees of acceptance to the reasoning articulated in Opinion 88-14.<sup>111</sup> While earlier decisions by both Florida and federal courts tended to question the opinion, in 1996 the pendulum seemed to swing the other way. The Third District Court of Appeal heartily endorsed Opinion 88-14 in *Reynoso v. Greynolds Park Manor, Inc.*<sup>112</sup> Granting plaintiff's petition for a writ of certiorari to quash a trial court order forbidding plaintiff's counsel from conducting ex parte interviews of the defendant nursing home's former employees, the court held that "the proscription of Rule 4-4.2 does not extend to former corporate employees."<sup>113</sup> The court relied on both Opinion 88-14 and American Bar Association Formal Opinion 91-359, and noted that its decision was in accord with "the great majority of the courts to have considered this issue."<sup>114</sup> The court certified that its decision was in direct conflict with a prior second district decision<sup>115</sup> in hope that the matter would be finally resolved by the Supreme Court of Florida.<sup>116</sup>

In another case involving ex parte communication with a nursing home's former employees, the Fourth District Court of Appeal aligned itself

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109. Fla. Bar Comm. on Professional Ethics, Op. 88-14 (1989).

110. *Id.* Although not mentioned in the opinion, the communicating lawyer "shall not state or imply that the lawyer is disinterested" and, when appropriate, must take reasonable efforts to correct any misunderstanding of the lawyer's role. RPC 4-4.3 (1987).

111. *See, e.g.*, *Rentclub v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995); *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995); *United States v. Florida Cities Water Co.*, No. 93-281-CIV-FTM-21, 1995 U.S. Dist. LEXIS 7507 (M.D. Fla. Apr. 26, 1995); *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993); *Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995); *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d Dist. Ct. App. 1992).

112. 659 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1995).

113. *Id.* at 1157.

114. *Id.*

115. *Id.* at 158. *See Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995).

116. *Reynoso*, 659 So. 2d at 1158. The supreme court's conflict jurisdiction, however, was never invoked pursuant to Rule 9.030(a)(2)(A) of the *Florida Rules of Appellate Procedure*.

with *Reynoso* and approvingly cited Opinion 88-14.<sup>117</sup> The appellate court held that the trial court departed from the essential requirements of law in entering an order prohibiting such contacts and requiring the communicating attorney to disclose any notes and statements taken as a result of the contacts.<sup>118</sup> The court's decision was also certified by the appellate court as directly conflicting with the Second District's decision.<sup>119</sup> Thus, the stage is now set for a supreme court opinion providing guidance in this problematic area.

*Reynoso* and *Schwartz* were not the only Florida cases facing the issue of contacts with former corporate employees. The First District Court of Appeal had the chance to squarely address the question, but managed to avoid doing so. Once again, *Boyd v. Pheo, Inc.*<sup>120</sup> involved contacts with a nursing home's current and former employees. The trial court's protective order barred plaintiff's counsel from contacting certain current and former employees of the defendant nursing home.<sup>121</sup> While acknowledging the certiorari jurisdiction that had been granted by the Third District Court of Appeal to decide the question, the First District Court of Appeal concluded that the exercise of its certiorari jurisdiction was not warranted because the likelihood of irreparable harm arising from the trial court's order had not been demonstrated.<sup>122</sup> The court reasoned:

[T]he order in this case does not prevent petitioner from engaging in discovery. Rather, it merely precludes her use of investigative techniques less formal than those called for in the rules governing discovery. Nothing in the order precludes petitioner from utilizing common discovery techniques to identify respondents' current and former employees (as it appears she has already done), and petitioner is not

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117. *Estate of Schwartz v. H.B.A. Management, Inc.*, 673 So. 2d 116 (Fla. 4th Dist. Ct. App. 1996).

118. *Id.* at 118.

119. *Id.* at 119.

120. 664 So. 2d 294 (Fla. 1st Dist. Ct. App. 1995).

121. The order prohibited *ex parte* contact with "present and former employees who directly participated in the care of the decedent," but did not bar such contact with "former employees who did not directly participate in such care." *Id.* at 295.

122. *Id.* at 295-96.



precluded from then deposing any witnesses she so identifies.<sup>123</sup>

Failure to honor the proscriptions of rule 4-4.2 can lead to adverse disciplinary consequences. Many lawyers do not realize that this rule prohibits them from even copying opposing counsel's client on correspondence directed to opposing counsel.<sup>124</sup> A lawyer who knowingly communicated with opposing counsel's client in this fashion was suspended from practice for ten days in *Florida Bar v. Nunes*.<sup>125</sup>

### C. Trial Conduct

The arena in which a lawyer most vigorously acts as an advocate for the client is in the courtroom during trial. A number of 1996 authorities addressed aspects of a lawyer's trial conduct, with particular attention placed on the proper bounds of jury argument.

Attempting to "judge shop" by hiring co-counsel in order to force a judge's recusal from the case was disapproved in *Robinson v. Boeing Co.*<sup>126</sup> The Eleventh Circuit Court of Appeals decided that, in order to avoid unnecessary delay in an active case, a federal district court may deny a litigant's request to hire additional counsel that would likely cause the trial judge's recusal.<sup>127</sup> The court noted that the apparent motivation of the party to create disqualification of the trial judge may be considered in ruling on motions to add or substitute counsel.<sup>128</sup>

All lawyers know that rule 4-3.1 prohibits the filing of frivolous claims or defenses.<sup>129</sup> Yet cases citing or discussing this rule are rare, especially

123. *Id.*

124. The Florida Bar Professional Ethics Committee has long considered such conduct to be improper. See Fla. Bar Comm. on Professional Ethics, Op. 76-21 (1977).

125. 661 So. 2d 1202, 1204 (Fla. 1995).

126. 79 F.3d 1053, 1056 (11th Cir. 1996). *Accord* Town Centre of Islamorada, Inc. v. Overby, 592 So. 2d 774, 776 (Fla. 3d Dist. Ct. App. 1992) (stating that "[o]rdinarily, a party may not bring an attorney into a case after it has been assigned to a judge, and then move to disqualify the judge on grounds that the judge has a bias against the attorney.").

127. *Robinson*, 79 F.3d at 1056.

128. *Id.* at 1055.

129. Rule 4-3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a pro-

outside of the disciplinary context. *P.T.S. Trading Corp. v. Habie*<sup>130</sup> concerned a lawyer who, ironically, filed what was determined to be a baseless abuse of process claim. A husband and wife were engaged in an apparently rancorous dissolution of marriage case.<sup>131</sup> The parties were living in Guatemala when his wife moved to Florida and began dissolution proceedings.<sup>132</sup> The wife obtained an ex parte injunction freezing assets of a company allegedly controlled by husband.<sup>133</sup> The dissolution action subsequently was settled, and the freeze order was lifted.<sup>134</sup>

Despite the husband's failure to honor the settlement agreement, his counsel filed an abuse of process suit against the wife and all lawyers who had worked for her in connection with the dissolution matter.<sup>135</sup> The suit alleged that the freeze order had been improperly secured for the unlawful purpose of forcing the husband to settle.<sup>136</sup> The trial court granted the wife's motion for summary judgment.<sup>137</sup> The Fourth District Court of Appeal affirmed, denouncing the conduct of the husband and his lawyers and awarding attorney's fees to the wife under section 57.105(1) of the *Florida Statutes*.<sup>138</sup> The court stated that "this lawsuit is utterly without any basis in law or fact and was filed in bad faith."<sup>139</sup> Quoting rule 4-3.1, the court

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ceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 4-3.1 (1987).

130. 673 So. 2d 498 (Fla. 4th Dist. Ct. App. 1996).

131. *Id.* at 499.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Habie*, 673 So. 2d at 500.

136. *Id.*

137. *Id.*

138. *Id.* (applying FLA. STAT. § 57.105(1) (1993)). Section 57.105(1) currently provides:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he or she as acted in good faith, based on the representations of his or her client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award prejudgment interest.

FLA. STAT. § 57.105(1) (1995).

139. *Habie*, 673 So. 2d at 499.

concluded its opinion by calling the lawyer's actions to the attention of The Florida Bar.<sup>140</sup>

The use of improper jury arguments was addressed in a number of appellate decisions, with trial court judgments being reversed in several cases. The improper arguments ordinarily violate rule 4-3.4(e),<sup>141</sup> but whether reversal is required depends on a variety of factors, including: 1) the severity of the offending remarks; 2) whether objections were made by opposing counsel; and 3) the law of the district in which the remarks occurred.

In *Muhammad v. Toys "R" Us*,<sup>142</sup> the First District Court of Appeal determined that defense counsel's argument violated RPC 4-3.4(e) where counsel: 1) suggested that plaintiff may have already settled with a non-party; 2) gave personal opinions regarding evidence and damages sought; 3) suggested that plaintiff's expert did not testify at trial because his deposition testimony was "ludicrous;" and 4) in attacking plaintiff's credibility, related a personal story about a family incident.<sup>143</sup> Despite the fact that the trial court had sustained some of plaintiff's objections and issued curative instruction, a new trial was ordered since "the collective import of counsel's personal injections, and irrelevant and inflammatory remarks, was so extensive as to have prejudicially pervaded the entire trial . . ."<sup>144</sup> This case is noteworthy because the first district urged trial courts to police these matters closely in order to avoid having judgments reversed and to curtail "unseemly conduct that lowers the professional reputation of the Bar and brings disrepute to our judicial system . . ."<sup>145</sup>

*Baptist Hospital v. Rawson*<sup>146</sup> was another reversal by the First District Court of Appeal. The improper arguments in this case so affected the fairness of the proceeding that a new trial was required even in the absence

140. *Id.* at 500.

141. Rule 4-3.4(e) provides that a lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

RPC 4-3.4(e) (1993).

142. 668 So. 2d 254 (Fla. 1st Dist. Ct. App. 1996).

143. *Id.* at 258.

144. *Id.* at 259.

145. *Id.* at 259 n.1.

146. 674 So. 2d 777 (Fla. 1st Dist. Ct. App. 1996).

of objections by defense counsel.<sup>147</sup> Comments by plaintiff's counsel concerning: 1) his personal views of the defendant hospital's actions<sup>148</sup> and the validity of its legal defenses;<sup>149</sup> 2) his perception of the jury's mission;<sup>150</sup> and 3) his personal reaction to the injuries suffered by the plaintiff,<sup>151</sup> were deemed to violate rule 4-3.4(e).<sup>152</sup>

The Fourth District Court of Appeal also reversed a case due to improper argument despite the lack of objections. In *Norman v. Gloria Farms*,<sup>153</sup> the court concluded that the offending remarks constituted fundamental error because of "the nature of the remarks, their collective import and their pervasiveness throughout closing argument . . . ."<sup>154</sup> Defense counsel repeatedly made statements that the court believed improperly appealed to the "passions and prejudices of this jury on the critical issues of liability and financial responsibility."<sup>155</sup> Counsel "went far beyond the traditionally impermissible golden rule arguments" by urging the jury to act, in effect, as "the conscience of the community."<sup>156</sup> Specifically, the arguments appealed to the prejudices and self-interest of the jurors by imploring them to make their decision based on how it would affect them personally and others in their community.<sup>157</sup> These arguments, in the court's opinion, went beyond the mere violation of rule 4-3.4(e) due to "their potential impact on the integrity of the fact-finding process . . . ."<sup>158</sup> *Norman* is useful for two reasons. First, it describes the fourth district's view on the issue of whether arguments that are improper, but not objected to, can be the basis of a reversal. Second, the opinion reviews the positions taken on this issue by other district courts.<sup>159</sup>

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147. *Id.* at 779.

148. Plaintiff's counsel stated that the defendant's decision not to take the injured plaintiff to the hospital emergency room "was the most ridiculous decision that anybody has ever made in history." *Id.* at 778.

149. Comments included statements that the hospital's defenses were "unbelievable" and "insulting." *Id.* at 779.

150. "If you let them get away with irresponsible medicine, then you breed irresponsible medicine." *Id.*

151. Counsel stated that he woke up with nightmares after viewing his client's day-in-the-life video. *Rawson*, 674 So. 2d at 779.

152. *Id.*

153. 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996).

154. *Id.* at 1024.

155. *Id.* at 1021.

156. *Id.*

157. *Id.*

158. *Norman*, 668 So. 2d at 1024.

159. *Id.* at 1023 n.7.

The scope of *Norman* was explained by the concurring opinion in another Fourth District Court of Appeal case, *Donahue v. FPA Corp.*<sup>160</sup> In *Donahue*, defense counsel referred to matters not in evidence and offered a personal attack on the credibility of plaintiff's expert.<sup>161</sup> No objections, however, were made regarding these comments.<sup>162</sup> The concurring opinion stated that these remarks violated rule 4-3.4(e), but viewed *Norman* as requiring reversal only in extreme cases.<sup>163</sup> Accordingly, the opinion warned lawyers practicing in the fourth district that "if counsel intend to appeal to this court, they would be well-advised to object" to improper argument at trial.<sup>164</sup>

A similar result was reached by the First District Court of Appeal in *Rockman v. Barnes*.<sup>165</sup> At trial, plaintiff's counsel violated rule 4-3.4(e) by expressing his personal beliefs concerning the evidence presented.<sup>166</sup> Defense counsel objected, the objections were sustained, and the judge issued curative instructions.<sup>167</sup> Nevertheless, on appeal the defendant argued that reversal of the judgment in favor of plaintiff was warranted because the improper arguments constituted reversible error.<sup>168</sup> While noting that it "definitely [did] not condone the injection of the personal opinion of plaintiff's counsel into argument before the jury[.]" the appellate court believed that a "fair trial was conducted despite the improprieties of counsel" and declined to reverse the judgment.<sup>169</sup> As in *Norman*, one judge concurred specially to state his view that precedent in the first district did not require reversal merely because arguments violated rule 4-3.4(e), but that the determinative question was whether "the conduct was so egregious as to affect the fairness of [the] proceedings."<sup>170</sup>

Yet another judge, this time from the Second District Court of Appeal, concurred specially to comment on the proper standards to be used by appellate courts in determining whether improper arguments warrant the

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160. 677 So. 2d 882 (Fla. 4th Dist. Ct. App. 1996) (Klein, J., concurring specially).

161. *Id.* at 883.

162. *Id.*

163. *Id.* at 884.

164. *Id.*

165. 672 So. 2d 890 (Fla. 1st Dist. Ct. App. 1996).

166. *Id.* at 891.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Rockman*, 672 So. 2d at 892 (Wolf, J., concurring specially).

granting of a new trial. In *D'Auria v. Allstate Insurance Co.*,<sup>171</sup> the concurring judge expressed the opinion that defense counsel's remarks to the jury violated rule 4-3.4(e).<sup>172</sup> The remarks in question included the injection of counsel's personal opinions, appeals to the jurors as the community's conscience, and "character assassinations" on the plaintiff, her counsel, and her witnesses.<sup>173</sup> No objections or motions for mistrial, however, were lodged by plaintiff's counsel and the appellate court affirmed the judgment.<sup>174</sup> The concurring opinion cites approvingly to another second district decision, *Hagan v. Sun Bank of Mid-Florida*.<sup>175</sup> *Hagan* contains a detailed analysis of the relationship between improper argument and reversible error that will be useful to both attorneys and judges in the second district.<sup>176</sup>

The Third District Court of Appeal found a debatable argument to be permissible in *Forman v. Wallshein*.<sup>177</sup> In this case, the court decided that, in a closing argument in a civil case, it was not improper argument for counsel to call opposing party a "liar" where there was a basis in the evidence to do so.<sup>178</sup> Additionally, the court noted that using the phrase "I think" or "I believe" in closing argument does not always constitute a prohibited expression of personal opinion.<sup>179</sup> Such phraseology is permissible where it is evident from the context that counsel is merely employing a figure of speech.<sup>180</sup>

Interestingly, although a significant number of appellate opinions condemned improper jury arguments as an ethical infraction, only one reported disciplinary case dealt with this issue.<sup>181</sup> In *Kelner*, a lawyer violated both rule 4-3.4(e) and the court's order by repeatedly referring in trial to matters that he did not reasonably believe to be relevant or supported by admissible evidence.<sup>182</sup> The lawyer's improper argument resulted in a

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171. 673 So. 2d 147 (Fla. 2d Dist. Ct. App. 1996).

172. *Id.* at 147 (Antoon, J., concurring specially).

173. *Id.*

174. *Id.*

175. *Id.* at 147-48 (referring to *Hagan v. Sun Bank of Mid-Florida*, 666 So. 2d 580 (Fla. 2d Dist. Ct. App. 1996)).

176. *Hagan*, 666 So. 2d at 587. Although the court in *Hagan* indicated that the arguments in question there were unprofessional, it made no statements regarding whether they violated the RPC. *Id.*

177. 671 So. 2d 872 (Fla. 3d Dist. Ct. App. 1996).

178. *Id.* at 874.

179. *Id.* at 875.

180. *Id.*

181. *Florida Bar v. Kelner*, 670 So. 2d 62 (Fla. 1996).

182. *Id.* at 63.

mistrial.<sup>183</sup> The supreme court, in publicly reprimanding the lawyer, commented that, while the lawyer “has a duty to zealously represent his client, this duty does not require that he violate a court order and produce a mistrial.”<sup>184</sup>

#### D. Termination of Representation

The point at which an attorney-client relationship may or must be terminated is often not clear to counsel.<sup>185</sup> Nor is it always clear to the

183. *Id.*

184. *Id.*

185. Rule 4-1.16 provides:

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client’s Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

RPC 4-1.16 (1995).

courts, when court approval is required.<sup>186</sup> This uncertainty is exacerbated when counsel is court-appointed. *Roberts v. State*<sup>187</sup> set forth the Fourth District Court of Appeal's helpful analysis of how a court should respond to motions to withdraw. In particular, motions that are filed by court-appointed criminal defense counsel in various factual circumstances.<sup>188</sup> Appointed counsel in *Roberts* represented a criminal defendant on several felony charges.<sup>189</sup> A plea agreement was reached after a jury was selected.<sup>190</sup> Just prior to sentencing, defense counsel moved to withdraw, citing an irretrievably broken attorney-client relationship.<sup>191</sup> The motion, however, did not include a request for a hearing on the withdrawal issue prior to the sentencing hearing.<sup>192</sup> At the sentencing hearing, the lawyer informed the court that his client wished to withdraw the guilty plea on the ground that the lawyer misled or coerced the client into agreeing to the plea bargain.<sup>193</sup> Despite defense counsel's request that the court grant his withdrawal and appoint a special public defender to argue the motion to withdraw the plea for the defendant, the court conducted an inquiry of the defendant regarding the plea withdrawal issue.<sup>194</sup> It then denied both counsel's motion to withdraw from the case and defendant's motion to withdraw the plea.<sup>195</sup>

On appeal the fourth district reversed, concluding that the trial court had erred in not hearing, and granting, counsel's motion to withdraw before moving on to the matter of defendant's motion to withdraw the plea.<sup>196</sup> The court's opinion pointed out that "[t]here is a spectrum of reasons for a public defender or court-appointed counsel to file a motion to withdraw, with differing responses required by the trial courts."<sup>197</sup> At one extreme, the trial court is required to grant a motion to withdraw when a public defender certifies to the court that the interests of two clients are so adverse or hostile

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186. Court approval is required before counsel may withdraw from a case in litigation. See FLA. R. JUD. ADMIN. 2.060(i).

187. 670 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1996). The fourth district followed its decision in *Martin v. State*, 675 So. 2d 246 (Fla. 4th Dist. Ct. App. 1996).

188. *Roberts*, 670 So. 2d at 1044.

189. *Id.* at 1043.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Roberts*, 670 So. 2d at 1043.

194. *Id.*

195. *Id.*

196. *Id.* at 1045.

197. *Id.* at 1043.



that the attorney faces an irreconcilable conflict of interest.<sup>198</sup> At the other extreme, the court is not required to permit withdrawal on the basis of a general loss of confidence by the client in the attorney, standing alone.<sup>199</sup> In between these two extremes are the difficult situations where the client alleges some degree of incompetence on the part of the attorney.<sup>200</sup>

The *Roberts* court found that an actual conflict of interest was present because the very basis for the motion to withdraw the guilty plea was the alleged misconduct of the defense lawyer.<sup>201</sup> Yet, the trial court's refusal to permit the lawyer to withdraw from the representation placed the lawyer "in the impossible position of attempting to argue the motion to withdraw the plea . . . ." <sup>202</sup> This conflict between the *personal interests* of defense counsel and his obligations to his client was a violation of rule 4-1.7(b).<sup>203</sup> Thus, the trial court erred in not permitting counsel to withdraw.

Additionally, as an ethical matter the steps prescribed in rule 4-1.16<sup>204</sup> must be followed when terminating representation of a client—even one who has not paid his or her bill. In *Florida Bar v. King*,<sup>205</sup> the Supreme Court of Florida stated that, "while lawyers are entitled to charge for their services, they cannot simply abandon a case once they have provided services without compensation."<sup>206</sup> For this and other transgressions, the lawyer was suspended for three years.<sup>207</sup>

### III. THE LAWYER AS A FIDUCIARY

Regrettably, each year lawyers are disciplined for violating their fiduciary duties as holders of funds that belong to others, such as partners, third parties, and especially clients.<sup>208</sup> A case that involved several of these

198. *Roberts*, 670 So. 2d at 1043 (citing *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994)).

199. *Id.* at 1044 (citing *Johnson v. State*, 497 So. 2d 863, 868 (Fla. 1986)).

200. *Id.*

201. *Id.* at 1045.

202. *Id.*

203. *See supra* note 49.

204. *See supra* note 185.

205. 664 So. 2d 925 (Fla. 1995). *See also supra* note 20 and accompanying text.

206. *Id.* at 924 (citing *Atilus v. United States*, 406 F.2d 694, 696 (5th Cir. 1969)).

207. *Id.*; accord *Florida Bar v. Hooper*, 509 So. 2d 289 (Fla. 1987).

208. In addition to the cases discussed in this section, other cases involving a lawyer's failure to fulfill his or her fiduciary responsibilities are also addressed in this article. *See cases cited supra* p. 234. *See also cases cited infra* pp. 275–81.

aspects was *Florida Bar v. Benchimol*.<sup>209</sup> While working for a law firm, the lawyer diverted client fee payments intended for the firm to his own use.<sup>210</sup> The lawyer's conduct was viewed all the more harshly because of the circumstances surrounding two affected clients: one client resided in Italy and was not conversant in English; the other was imprisoned in another state.<sup>211</sup> Disbarment was ordered.<sup>212</sup>

An interesting civil case in which the nature of a lawyer's trust fund obligations were discussed is *Kenet v. Bailey*.<sup>213</sup> A lawyer and his law firm represented a client in litigation and recovered funds, which were deposited into the firm's trust account pending resolution of related disputes through arbitration. The litigation concerned a business venture in which the lawyer and the client, among others, participated. Various agreements and releases were executed. A few years later, the firm disbursed the trust account funds to itself without notifying the client. At around the same time, the lawyer had the client execute another release. When the client learned that the trust funds had been removed by the firm, he sued the lawyer and the firm. Raising a rather novel defense, the firm asserted that the language of the release freed it from all "debts" owed to the client—including the trust funds. The trial court agreed and rendered summary judgment for the firm. Completely rejecting this defense, the appellate court reversed the judgment. The court colorfully stated that "the characterization of a client's funds held by an attorney in his trust account as constituting a 'debt' is woefully inadequate, akin to describing Dadeland Mall as a shoe store."<sup>214</sup> Citing Judge Cardozo's famous description of a fiduciary relationship,<sup>215</sup> the court went on to note that such a relationship is created when a lawyer receives trust funds to be used for a client's purposes and that misuse of such funds "is one of the most serious offenses a lawyer can commit."<sup>216</sup>

Some decisions by the Supreme Court of Florida in response to petitions seeking amendments to the Rules Regulating The Florida Bar directly related to the lawyer's role as fiduciary. In a decision that received little notice but could affect the way many lawyers handle real estate closings, the court amended rule 5-1.1(g) to broaden the list of limited-risk trust account

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209. 21 Fla. L. Weekly S226 (May 23, 1996).

210. *Id.* at S226.

211. *Id.*

212. *Id.* at S227.

213. 21 Fla. L. Weekly D982 (3d Dist. Ct. App. Apr. 24, 1996).

214. *Id.* at D983.

215. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

216. *Kenet*, 21 Fla. L. Weekly at D983.

deposits against which a lawyer may disburse before the funds are actually collected to include checks written by title agencies authorized to do business in Florida.<sup>217</sup>

In contrast, other supreme court decisions regarding rules received much greater publicity.<sup>218</sup> A petition was filed by fifty Florida Bar members, who are also members of the Florida Chapter of the American Academy of Matrimonial Attorneys, seeking to create a new rule that would impose specific regulations and restrictions upon Florida lawyers practicing in "family law matters."<sup>219</sup> Proposed rule 4-1.18 would have required written fee agreements and a statement of client's rights, strictly prohibited attorney-client sexual relations, and addressed several controversial matters such as nonrefundable retainers and attorney's liens. The supreme court declined to adopt the proposed rule, citing two reasons. First, the court agreed with the position taken by the Florida Bar Board of Governors that no justification was shown to warrant treating family law practitioners differently than other bar members.<sup>220</sup> Second, the court noted that its recent adoption of a rule governing a lawyer's sexual relationships with clients<sup>221</sup> addressed some of the concerns raised by the petitioners.<sup>222</sup>

Finally, in *Bankers Trust Realty, Inc. v. Kluger*<sup>223</sup> the Third District Court of Appeal addressed the proper pleading of a claim for breach of fiduciary duty against a lawyer. Affirming the trial court's dismissal for

217. Florida Bar re Amendments to Rules Regulating The Florida Bar, 658 So. 2d 930, 951 (Fla. 1995). Prior to the amendment to rule 5-1.1(g), a lawyer could disburse against checks written by licensed title insurance agencies, but not "title agencies."

218. See, e.g., Mark D. Killian, *Court Okays New Bar Rules*, FLA. B. NEWS, Aug. 15, 1995, at 1; Mark D. Killian, *Petition Draws Fire*, FLA. B. NEWS, Sept. 1, 1995, at 1.

219. Amendment to Rules Regulating The Florida Bar -- Rule 4-1.18, Client-Lawyer Relationships in Family Law Matters, 662 So. 2d 1246 (Fla. 1995).

220. *Id.* at 1247.

221. Florida Bar re Amendments to Rules Regulating The Florida Bar, 658 So. 2d 930 (Fla. 1995). Subdivision (i) of rule 4-8.4, "Misconduct," provides that a lawyer shall not "engage in sexual conduct with a client that exploits the lawyer-client relationship." RPC 4-8.4(i) (1987). Rule 4-8.4 appears to be somewhat less restrictive than proposed rule 4-1.18, which was rejected by the court. Proposed rule 4-1.18 would have flatly prohibited the commencement of an attorney-client sexual relationship, while rule 4-8.4(i) seems to permit attorney-client sexual conduct unless it "exploits" the attorney-client relationship. Additionally, the comment to rule 4-8.4(i) further restricts the reach of the rule: "For purposes of this subdivision, client means an individual, not a corporate or other nonpersonal entity, and lawyer refers only to the lawyer(s) engaged in the legal representation and not other members of the law firm." RPC 4-4.8(i) cmt.

222. *Id.*

223. 672 So. 2d 897 (Fla. 3d Dist. Ct. App. 1996).

failure to state a cause of action, the appeal's court held that the specifics of the alleged breach must be pleaded. It is not sufficient for a plaintiff to simply allege a legal conclusion such as failure to timely act; rather, the plaintiff must allege facts showing not only the damages allegedly suffered, but the causal relationship between the attorney's allegedly deficient acts and the damages.<sup>224</sup>

#### IV. THE LAWYER AS AN OFFICER OF THE COURT

Lawyers are commonly referred to as "officers of the court."<sup>225</sup> In our three-branch system of government, a lawyer is more than just a client's agent. The Rules of Professional Conduct, as well as case law,<sup>226</sup> impose upon a lawyer obligations to the court (or the "justice system") that sometimes limit—or even conflict with—the lawyer's duties to the client. For example, in an ex parte proceeding a lawyer must inform the court of all relevant facts, even when the facts are adverse to the lawyer's client.<sup>227</sup> Although the tension between the lawyer's duties to both the client and the court can create ambiguities regarding a lawyer's proper role in a particular situation, it is clear that a professionally responsible lawyer simply must have a sense of the scope of his or her duties as an officer of the court.<sup>228</sup>

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224. *Id.* at 898.

225. For example, the very first sentence of the preamble to the *Rules of Professional Conduct* provides: "A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." RPC Preamble (1987) (emphasis added). The preamble mentions this role several other times as well. RPC Preamble (1987). "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. . . . Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities." *Id.* Additionally, the Comment to rule 4-6.1, which is titled "Pro Bono Public Service," states in part: "As an officer of the court, each member of The Florida Bar in good standing has a professional responsibility to provide pro bono legal service to the poor." RPC 4-6.1 (1995).

226. *See, e.g.*, 84 Lumber Co. v. Cooper, 656 So. 2d 1297, 1300 (Fla. 2d Dist. Ct. App. 1994) (holding that a lawyer has ethical obligation, as an officer of the court, to immediately raise before a trial court the fundamental issue of lack of subject matter jurisdiction, after it becomes apparent, in order to prevent an unnecessary expenditure of precious client and judicial resources).

227. RPC 4-3.3(d) (1987).

228. Awareness of this role as "officer of the court" becomes even more critical when one considers the new "professionalism" initiatives that are springing up. *See, e.g.*, Gary Blankenship, *Bar Panel Seeks Okay For a Center for Professionalism*, FLA. B. NEWS, Apr. 1, 1996, at 1; Gary Blankenship, *Professionalism on Front Burner*, FLA. B. NEWS, July 15, 1996, at 1.

The lawyer appeared to lack this sense in *Florida Bar v. Tobin*<sup>229</sup> and, consequently, was suspended from practice for forty-five days. The lawyer represented a company in an action against an insurer. Judgment was rendered for the company, and the insurer deposited funds into the court registry in satisfaction of the judgment. Some of the funds were disbursed pursuant to court order. The lawyer's associate then hand-delivered a motion to the court requesting release of the remaining funds; the insurer was not timely noticed. In an ex parte proceeding, the associate represented to the court that the motion was unopposed. The court granted the motion. The funds were released and given to the president of the lawyer's corporate client. Needless to say, when the insurer learned of these actions it immediately attempted to recover the improperly withdrawn funds. The court ordered the lawyer and the client to return the funds, but the lawyer never did so.<sup>230</sup> In the subsequent disciplinary proceeding, the supreme court agreed with the referee<sup>231</sup> that the lawyer's conduct violated his duty of candor to the court under rule 4-3.3(d)<sup>232</sup> by not providing the court with all of the necessary material facts in the ex parte proceeding.<sup>233</sup> The lawyer also violated rule 4-3.4(c)<sup>234</sup> by disobeying an obligation under the court's rules.<sup>235</sup>

A lawyer was disciplined for what amounted to a lack of professionalism in *Florida Bar v. Uhrig*.<sup>236</sup> While representing a client in a child support matter, the lawyer mailed an "insulting and highly unprofessional"<sup>237</sup> five-page letter to the client's ex-husband. The lawyer acknowledged that the letter caused the recipient to feel "disparaged, humiliated, offended, disap-

229. 674 So. 2d 127 (Fla. 1996).

230. *Id.* at 128.

231. The Supreme Court of Florida appoints a county or circuit judge to preside as "referee" over the trial of disciplinary cases. RPC 3-7.6(a) (1987).

232. Rule 4-3.3(d) provides:

Ex Parte Proceedings. In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 4-3.3(d) (1995).

233. *Tobin*, 674 So. 2d at 128.

234. Rule 4-3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." RPC 4-3.4(c) (1987).

235. *Tobin*, 674 So. 2d at 129.

236. 666 So. 2d 887 (Fla. 1996).

237. *Id.* at 887. Among other things, the letter included "an inflammatory simile comparing [the recipient]'s opinions to body odor . . ." *Id.* at 888.

pointed, and angry.”<sup>238</sup> Noting that rule 4-8.4(d)<sup>239</sup> prohibits lawyers from knowingly humiliating litigants on any basis, the supreme court publicly reprimanded the lawyer for violating this rule. *Uhrig* is especially significant because it appears to be the first case in which a lawyer was disciplined solely for violating the anti-disparagement provisions of RPC 4-8.4 since their adoption in 1993.<sup>240</sup>

As mentioned above, the lawyer’s unique role as an “officer of the court” arises from our three-branch governmental system. The Supreme Court of Florida had occasion in *TGI Friday’s, Inc. v. Dvorak*<sup>241</sup> to explain the different roles that the judicial branch and the legislative branch play in our legal system. In upholding the constitutionality of the offer of judgment statute<sup>242</sup> and its attorney’s fee provision, the court stated:

Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law. In *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992), we noted that the judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other’s constitutional powers.<sup>243</sup>

The Fourth District Court of Appeal ventured into an area that has rarely been mentioned in recent judicial decisions—the common law doctrines of champerty and maintenance. In *Kraft v. Mason*,<sup>244</sup> the court

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238. *Id.*

239. Rule 4-8.4 (d) provides that a lawyer shall not “‘engage in conduct’ in connection with the practice of law ‘that is prejudicial to the administration of justice,’ including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.” RPC 4-8.4(d) (1987).

240. Florida Bar re Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720 (Fla. 1993).

241. 663 So. 2d 606 (Fla. 1995).

242. FLA. STAT § 768.79 (1987).

243. *Dvorak*, 663 So. 2d at 611.

244. 668 So. 2d 679 (Fla. 4th Dist. Ct. App. 1996).

offered modern definitions of these concepts.<sup>245</sup> These doctrines are not terribly relevant to most practitioners, but they may become more so in the wake of the renewed interest in lawyer advertising and solicitation that has followed the United States Supreme Court's 1995 decision in *Florida Bar v. Went For It, Inc.*<sup>246</sup>

## V. THE LAWYER AS A BUSINESSPERSON

Decisions connected with the business aspects of practicing law were plentiful during the survey period. Cases, ethics opinions, and rule amendments were handed down in business-related areas such as attorney's fees, the organization and operation of law firms, a lawyer's relationship with nonlawyers who might assist the lawyer in the practice of law, and marketing activities undertaken by lawyers and law firms.

### A. Attorneys' Fees

An extremely important decision addressing attorney's fee agreements in light of public policy was rendered by the Supreme Court of Florida in *Chandris, S.A. v. Yanakakis*.<sup>247</sup> *Chandris* should be a wake-up call for those Florida lawyers who have not paid sufficient attention to the details of the rules governing contingent fee contracts and referral fees. The supreme court has served notice that strict compliance with these rules is required in order for these agreements to be enforceable.

*Chandris* was rendered in response to certified questions of law posed by the Eleventh Circuit Court of Appeals. The federal case concerned a claim of tortious interference with contracts for legal representation.<sup>248</sup> An injured foreign seaman was treated in a Florida hospital. There he met with a Florida resident who was licensed to practice law in Massachusetts, but not in Florida. The seaman signed a contingent fee representation agreement

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245. *Id.* at 682. The court considered the "modern view" of "maintenance" to be "the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring [an] action[] or to . . . [defend a suit] which they have no right to make . . . ." *Id.* at 682 (quoting 9 FLA. JUR. 2D *Champerty and Maintenance* § 1 (1979)). The court approved the definition of "champerty" as "a form of maintenance wherein one will carry on a suit in which he has no subject matter interest at his own expense or will aid in doing so in consideration of receiving, if successful, some part of the benefits recovered." *Id.* (citations omitted). "[O]fficious intermeddling is a necessary element of champerty." *Id.*

246. 115 S. Ct. 2371 (1995).

247. 668 So. 2d 180 (Fla. 1996).

248. *Id.* at 181.

with the Massachusetts attorney. The Massachusetts attorney then contacted a local Florida law firm, and the seaman subsequently signed a contingent fee agreement with the Massachusetts attorney and the Florida firm. Although signed by the seaman and the Massachusetts attorney, this second fee agreement was not signed by the Florida law firm and was silent as to any division of fee between the lawyers involved. The seaman ultimately settled his case directly with the defendants and discharged the Massachusetts attorney and the Florida firm, who then sued the defendants for tortious interference.<sup>249</sup>

The supreme court concluded that, by entering into a contingent fee agreement in Florida with a putative client, an out-of-state lawyer who resides in Florida, but is not admitted to practice in this state, engages in a professional activity without proper authority and thus engages in the unauthorized practice of law as proscribed by *Florida Bar v. Savitt*.<sup>250</sup> Consequently, the fee contract executed by the Massachusetts attorney was held to be void as against public policy.<sup>251</sup> The second fee contract did involve a Florida law firm but did not comply with the applicable requirements of rule 4-1.5.<sup>252</sup> Regarding this second fee agreement, the court

249. *Id.* at 181–82.

250. *Id.* at 184 (citing *Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978)).

251. *Id.* at 186. The fee contract was not signed by all participating attorneys; it did not spell out the division of fee between those attorneys; it did not provide that each participating attorney would have joint legal responsibility for the case and that the attorney should be available for consultation with the client. *Chandris*, 668 So. 2d 186.

252. Rule 4-1.5(f) provides:

(f) Contingent Fees. As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the



consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33-1/3% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million;

plus

3. 20% of any portion of the recovery exceeding \$2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million;

plus

3. 20% of any portion of the recovery exceeding \$2 million,

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33-1/3% of any recovery up to \$1 million; plus

2. 20% of any portion of the recovery between \$1 million and \$2 million; plus

3. 15% of any portion of the recovery exceeding \$2 million.

d. An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in (f)(4)(B)(i), the client may petition the circuit court for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) In cases where the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney's fee in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this as-

stated: “[W]e hold that a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable.”<sup>253</sup> The court clearly declared its intent to adopt a bright line rule and appeared to reject any kind of “substantial compliance” standard. The court expressly rejected an existing line of district court of appeal cases “to the extent they may be read to hold that a contingent fee contract which does not comply with the Code of Professional Responsibility or the Rules Regulating The Florida Bar is enforceable by an attorney who claims fees based upon a noncomplying agreement.”<sup>254</sup> A lawyer whose

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pect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

#### RPC 4-1.5 (f) (1995).

Regarding the division of fees between lawyers in different firms (which includes referral fee situations), rule 4-1.5(g) provides:

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

- (1) the division is in proportion to the services performed by each lawyer; or
- (2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

#### RPC 4-1.5(g) (1995).

253. *Chandris*, 668 So. 2d at 185–86.

254. *Id.* at 185. Cases mentioned in the court’s opinion were: *Fernandes v. Barrs*, 641 So. 2d 1371 (Fla. 1st Dist. Ct. App. 1994) and *Harvard Farms, Inc. v. National Casualty Co.*, 617 So. 2d 400 (Fla. 3d Dist. Ct. App. 1993). Similar cases whose holdings would appear to be affected by *Chandris* include *Ganson v. Department of Admin.*, 554 So. 2d 522 (Fla. 1st Dist. Ct. App. 1989), *rev’d on other grounds*, 566 So. 2d 792 (Fla. 1990), and *Weaver v.*

contingent fee agreement does not comply with applicable rules is not *completely* foreclosed from collecting a fee; in a footnote, the court pointed out that such a lawyer "would still be entitled to the reasonable value of his or her services on the basis of quantum meruit."<sup>255</sup>

The exact parameters of the *Chandris* decision remain to be determined. The case undoubtedly will spawn litigation, as clients seek to evade contingent fee obligations to their lawyers and lawyers attempt to avoid payment of referral fees to one another. In fact, the First District Court of Appeal has already indicated its uncertainty about the scope of the decision by certifying to the supreme court the question of whether the rule established in *Chandris* gives a private party standing to seek an injunction based on a violation of the Rules of Professional Conduct.<sup>256</sup>

Another bright line fee rule previously announced by the supreme court was relied upon by the Fourth District Court of Appeal in *Kocha & Jones, P.A. v. Greenwald*.<sup>257</sup> The appellate court reversed a judgment in favor of a law firm that had withdrawn from a contingent fee case and subsequently sued the client for attorney's fees.<sup>258</sup> The court followed *Faro v. Romani*,<sup>259</sup> which held that a lawyer who withdraws from representation prior to occurrence of the contingency upon his or own volition *forfeits all rights to compensation* (unless the client's conduct made the lawyer's continued representation either legally impossible or ethically improper).<sup>260</sup>

Another case that could be relevant to lawyers handling contingent fee cases was *Doremus v. Florida Energy Systems of South Florida, Inc.*<sup>261</sup> This case concerned the responsibility for attorney's fees in a case in which a client had employed two or more lawyers in succession. When a client changes lawyers in a contingent fee case, the lawyers involved (i.e., the successor lawyer and the discharged lawyer(s)) often work out an arrangement whereby they agree on a split of the attorney's fee called for in the client's contract with the successor lawyer. For example, if the client signed a forty percent contingent fee agreement in a personal injury case with one lawyer, then subsequently discharged that lawyer and signed a similar

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School Board of Leon County, 624 So. 2d 761 (Fla. 1st Dist. Ct. App. 1993), *review denied*, 634 So. 2d 629 (Fla.), *cert. denied*, 115 S. Ct. 119 (1994).

255. *Id.* at 186 n.4.

256. *See* Smith v. Bateman Graham, P.A., 21 Fla. L. Weekly D947, D948 (1st Dist. Ct. App. Apr. 19, 1996). *See* discussion *infra* p. 273.

257. 660 So. 2d 1074 (Fla. 4th Dist. Ct. App. 1995).

258. *Id.* at 1075.

259. 641 So. 2d 69 (Fla. 1994).

260. *Id.* at 71 (citations omitted).

261. 676 So. 2d 444 (Fla. 4th Dist. Ct. App. 1996).

contract with another lawyer, the two lawyers would agree<sup>262</sup> on an acceptable division of the forty percent fee amount that, per the contract, was due the second lawyer. This practice seems to be common, and some attorneys believe that it is required—especially in cases to which the maximum contingent fee schedule applies, such as personal injury matters.<sup>263</sup>

A 1980 First District Court of Appeal case, however, decided that a discharged attorney's quantum meruit fee in a contingent case is to be paid from the client's share of recovery, rather than as a portion of the successor counsel's fee. However, the first district case, *Adams v. Fisher*,<sup>264</sup> was decided prior to the supreme court's imposition of a maximum contingent fee schedule in 1986.<sup>265</sup> The question occasionally raised is whether the adoption of the fee schedule changes the result reached in *Adams*. Stated another way, the question is whether, in adopting the fee schedule, the supreme court intended to cap the amount that one client would pay in one case or whether the schedule was intended to limit the amount of fee that one attorney (perhaps one of several employed in succession) could charge one client in one case. Although no cases directly address this question, the decisions in *Doremus* and other cases<sup>266</sup> indicate that *Adams* remains unaffected by the existence of the fee schedule. This means that the client, rather than the successor counsel, can be called upon to pay any quantum meruit fee<sup>267</sup> owed to a discharged lawyer in a contingent fee case.<sup>268</sup>

262. Presumably with the client's written consent, as required by rule 4-1.5(g)(5). See *supra* note 252 and accompanying text.

263. *Id.*

264. 390 So. 2d 1248 (Fla. 1st Dist. Ct. App. 1980).

265. Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960 (Fla. 1986).

266. See, e.g., *Law Offices of Theodore Goldberg v. Fazio, Dawson, DiSalvo, Cannon, Abers & Podrecca*, 659 So. 2d 1200 (Fla. 3d Dist. Ct. App. 1995); *Stabinski, Funt & De Oliveira, P.A. v. Alvarez*, 490 So. 2d 159, 160 n.1 (Fla. 3d Dist. Ct. App. 1986).

267. See *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982).

268. A successor attorney who enters into a contingent fee agreement at the maximum allowed rate and concludes the case with a minimum of work, or primarily as a result of discharged counsel's efforts, could be considered to have acted unethically by charging a clearly excessive fee in violation of rule 4-1.5(a). This rule provides:

(a) **Illegal, Prohibited, or Clearly Excessive Fees.** An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for

A novel argument concerning entitlement to fees was made—and rejected—in *Life Care Centers of America, Inc. v. Chiles*.<sup>269</sup> A law firm represented a client in a class action against the state on contingent fee basis. The client withdrew from the class action and received no recovery in that suit. At about the same time, the client settled a preexisting dispute with the state. The trial court found that the preexisting dispute was not related to the class action and that it was not resolved on the strength of the class action, but nevertheless awarded a quantum meruit to the firm. The firm had argued that its efforts in the class action led to resolution of the other dispute. The first district reversed the fee award, ruling that as a matter of law the firm was entitled to no fee under *Rosenberg v. Levin*<sup>270</sup> because the contingency (i.e., recovery in the class action initiated by the firm) never occurred.<sup>271</sup>

### B. Organization and Operation of Law Firms

The key development in this area was the supreme court's approval of rule changes that permit Florida lawyers to practice law in the form of a professional limited liability company or a registered limited liability partnership.<sup>272</sup> These forms now join the professional service corporation as corporate forms of practice that have been approved by the court.<sup>273</sup>

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services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

RPC 4-1.5(a) (1987).

269. 674 So. 2d 873 (Fla. 1st Dist. Ct. App. 1996).

270. *Rosenberg*, 409 So. 2d at 1016.

271. *Chiles*, 674 So. 2d at 874.

272. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272 (Fla. 1996). As amended, rule 4-8.6 provides:

(a) Authorized business entities. Lawyers may practice law in the form of professional service corporations, professional limited liability companies, or registered limited liability partnerships organized or qualified under applicable law. A professional service corporation, a professional limited liability company, or a registered limited liability partnership is an authorized business entity under these rules.

(b) Practice of Law Limited to Members of The Florida Bar. No authorized business entity may engage in the practice of law in the state of Florida or render advice under or interpretations of Florida law except through officers, directors, partners, managers, agents, or employees who are qualified to render legal services in this state.

(c) Qualifications of Managers, Directors and Officers. No person shall serve as a partner, manager, director or executive officer of an authorized business entity and engaged in the practice of law in Florida unless such person is le-

gally qualified to render legal services in this state. For purposes of this rule the term "executive officer" shall include the president, vice-president, or any other officer who performs a policy-making function.

(d) Violation of Statute or Rule. A lawyer who, while acting as a shareholder, member, officer, director, partner, manager, agent, or employee of an authorized business entity and engaged in the practice of law in Florida, violates or sanctions the violation of the authorized business entity statutes or the Rules Regulating The Florida Bar shall be subject to disciplinary action.

(e) Disqualification of Shareholder, Member, or Partner; Severance of Financial Interests. Whenever a shareholder of a professional service corporation, a member of a professional limited liability company or partner in a registered limited liability partnership becomes legally disqualified to render legal services in this state, said shareholder, member, or partner shall sever all employment with and financial interests in such authorized business entity immediately. For purposes of this rule the term "legally disqualified" shall not include suspension from the practice of law for a period of time less than 91 days. Severance of employment and financial interests required by this rule shall not preclude the shareholder, member, or partner from receiving compensation based on legal fees generated for legal services performed during the time when the shareholder, member, or partner was legally qualified to render legal services in this state. This provision shall not prohibit employment of a legally disqualified shareholder, member, or partner in a position that does not render legal service nor payment to an existing profit sharing or pension plan to the extent permitted in rule 4-5.4(a)(3), or as required by applicable law.

(f) Cessation of Legal Services. Whenever all shareholders of a professional service corporation, or all members of a professional limited liability company, or all partners in a registered limited liability partnership become legally disqualified to render legal services in this state, the authorized business entity shall cease the rendition of legal services in Florida.

(g) Application of Statutory Provisions. Unless otherwise provided in this rule, each shareholder, member, or partner of an authorized business entity shall possess all rights and benefits and shall be subject to all duties applicable to such shareholder, member, or partner provided by the statutes pursuant to which the authorized business entity was organized or qualified.

RPC 4-8.6 (1987).

Rule 4-5.4(e) was amended to conform with the changes to rule 4-8.6 and currently provides:

(e) Nonlawyer Ownership of Authorized Business Entity. A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RPC 4-5.4(e) (1987).

273. See *In re Florida Bar*, 133 So. 2d 554 (Fla. 1961).

### C. Lawyer's Relationship With Nonlawyer Personnel

Several cases explored the permissible parameters of the relationship that a lawyer has with nonlawyers who may assist or participate with the lawyer in the practice of law. In *State v. Foster*,<sup>274</sup> a criminal law case concerning the unlicensed practice of law, the First District Court of Appeal emphasized that a nonlawyer may not, on behalf of another person, question witnesses in *depositions* even under the immediate guidance and supervision of a licensed attorney. The only exceptions to this broad prohibition are "those instances in which the Supreme Court of Florida has expressly authorized nonlawyers to engage in practice under the immediate supervision of a licensed attorney," such as the law school third-year practice program.<sup>275</sup>

In *Florida Bar v. Beach*,<sup>276</sup> a lawyer was disciplined because his working relationship with a paralegal firm overstepped permissible bounds. The lawyer purported to act as the paralegals' "supervising attorney" on an independent contractor basis. The lawyer discussed the legal needs of the paralegal firm's customers with the firm, reviewed documents prepared by the paralegal firm for its customers, and offered thirty minute consultations with those customers. The lawyer was paid seventy-five dollars per case by the paralegal firm.<sup>277</sup>

One of the firm's customers complained to the bar about services that the paralegal rendered to her as a direct result of the lawyer's advice. The supreme court suspended the lawyer from practice for ninety days for violating two Rules of Professional Conduct. First, the lawyer assisted nonlawyers in the unlicensed practice of law.<sup>278</sup> The court noted that the

274. 674 So. 2d 747 (Fla. 1st Dist. Ct. App. 1996).

275. *Id.* at 754 (Joanos & Lawrence, JJ., concurring). See, e.g., Chapter 11, R. REGULATING FLA. BAR (law school practice program); Chapter 12, R. REGULATING FLA. BAR (emeritus attorneys pro bono participation program); Chapter 13, R. REGULATING FLA. BAR (authorized legal aid practitioners rule).

276. 675 So. 2d 106 (Fla. 1996).

277. *Id.* at 107.

278. Rule 4-5.4(a) provides:

(a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the



lawyer “improperly allowed [one of the paralegal firm’s owners] to act as his conduit for giving legal advice by obtaining and relaying, without supervision, case-specific information to persons whom [the lawyer] never actually met or consulted.”<sup>279</sup> Essentially, this arrangement put the cart before the horse, with the lawyer working for the paralegal instead of vice versa. The court also agreed with the referee’s finding that the lawyer improperly shared legal fees with nonlawyers.<sup>280</sup> Finally, despite the existence of “a close question,” the court found support in the record for the referee’s conclusion that no attorney-client relationship was formed between the lawyer and the complaining customer.<sup>281</sup> The court, however, took care to “caution lawyers that they should be very careful in placing themselves in such difficult positions.”<sup>282</sup>

Other working arrangements between lawyers and nonlawyers were condemned as unethical by the Florida Bar Professional Ethics Committee. In Florida Ethics Opinion 95-1, the Committee concluded that a Florida Bar member who maintains a law practice or otherwise holds himself or herself out as a lawyer may not ethically enter into a business arrangement with a nonlawyer to represent claimants in social security disability matters. Fees claimed by or paid to the bar member for such representation would be

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total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; and

(4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.

RPC 4-5.4(a) (1987).

279. *Beach*, 675 So. 2d at 109.

280. Rule 4-5.5(b) provides that a lawyer shall not “assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.” RPC 4-5.5(b) (1987).

281. *Beach*, 675 So. 2d at 109. The conclusion that the lawyer did not have an attorney-client relationship with the customer was important, because it had been alleged that the lawyer represented conflicting interests. The referee cited the following factors in concluding that an attorney-client relationship had not been established: The customer specifically sought assistance from the paralegal rather than the lawyer; the customer entered into contract with the paralegal, not the lawyer; the contract specifically disclaimed representation by the lawyer; and the customer never met the lawyer but dealt exclusively with the paralegal. *Id.*

282. *Id.*

considered legal fees, and thus this type of arrangement violates rule 4-5.4, which prohibits a lawyer from sharing legal fees with a nonlawyer.<sup>283</sup>

Similarly, in Florida Ethics Opinion 95-2 the Committee criticized a lawyer's proposed involvement with a corporation that represents clients in securities arbitration matters. The plan presented to the committee called for the corporation to somehow obtain clients and pay the inquiring attorney to represent those clients in negotiation and arbitration (if necessary). The corporation would pay the attorney in the form of a retainer and a percentage of the company's contingent fee. The Professional Ethics Committee pointed to problems concerning conflicts of interest, solicitation, fee-splitting, and assisting the unauthorized practice of law.

In the more traditional vein of lawyers' relationships with nonlawyers was *Florida Bar v. Burkich-Burrell*.<sup>284</sup> The lawyer represented her husband in a claim arising from an auto accident. The client-husband's response to interrogatories failed to disclose a prior accident and related medical treatment, of which the lawyer-wife had personal knowledge.<sup>285</sup> When charged with misrepresentation, the lawyer defended by asserting that the interrogatory answers had been prepared by her paralegal and that she had not reviewed them. Rejecting this defense, the supreme court stated that "an attorney has a duty to review a client's sworn answers to interrogatories for correctness, even when the answers have been prepared by the client and a paralegal."<sup>286</sup>

Even when an attorney merely shares space with a nonlawyer, the attorney must be careful to adhere to the guidelines set out in Florida Ethics Opinion 88-15. Failing to do so could result in the attorney being held ethically responsible for the nonlawyer's actions, as happened in *Florida Bar v. Flowers*.<sup>287</sup>

#### D. Marketing Activities of Lawyers

Rules regulating marketing activities by lawyers and law firms have changed greatly over the years, but one thing has remained constant: in-person solicitation of prospective clients with whom the lawyer has no prior professional relationship is strictly prohibited.<sup>288</sup> Following the tragic crash

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283. See *supra* note 278.

284. 659 So. 2d 1082 (Fla. 1995).

285. *Id.* at 1083.

286. *Id.* at 1084.

287. See discussion *supra* p. 234.

288. Rule 4-7.4(a) provides:

of a ValuJet airplane in the Florida Everglades, The Florida Bar asked the supreme court to impose emergency suspensions on two lawyers who were accused of engaging in prohibited solicitation of victims' family members. Although the court declined to suspend the lawyers, it enjoined the lawyers from any further contact with family or friends of the crash victims as well as from entering into employment agreements regarding the crash.<sup>289</sup> Additionally, the court appointed a senior judge to scrutinize, in light of *Chandris*,<sup>290</sup> any ValuJet crash employment agreements already entered into by either of the lawyers.

On the advertising side, the supreme court amended several rules affecting how lawyers may market themselves through direct mail communications and ads in the public media. Three changes were made to rules governing the filing of lawyer ads for review by the Florida Bar's Standing Committee on Advertising:<sup>291</sup> lawyers who advertise via direct mail are no longer required to file with the bar the names and addresses of persons to whom direct mail letters are sent;<sup>292</sup> a more specific definition was provided for "public services announcements," which can be exempt from the filing and review requirement;<sup>293</sup> lawyers who fail to timely submit their ads for

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(a) Solicitation. A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule.

RPC 4-7.4(a) (1987).

The long-standing, bright line rule against in-person solicitation could be in jeopardy. In 1993 the United States Supreme Court invalidated a rule barring Florida certified public accountants from in-person solicitation of accounting business. *Edenfield v. Fane*, 507 U.S. 761 (1993). Although the *Edenfield* court clearly distinguished lawyers from accountants, a federal judge in the Northern District of Georgia recently relied on *Edenfield* in striking down the State Bar of Georgia's ethics rule proscribing in-person solicitation of prospective clients. *See Falanga v. State Bar of Georgia*, No. 1:95-cv-2160-GET (N.D. Ga. Jul. 18, 1996).

289. *See Florida Bar v. Perez*, 676 So. 2d 415 (Fla. 1996); *Florida Bar v. Hernandez*, 676 So. 2d 414 (Fla. 1996).

290. *See supra* pp. 260-69.

291. *See generally* RPC 4-7.5.

292. Florida Bar re Amendments to Rules Regulating The Florida Bar, 658 So. 2d 930, 943 (Fla. 1995) (amending RPC 4-7.4(b)(2)(B)).

293. *Id.* at 945.

review as required are now subject to a "late fee" of \$250 per ad rather than the usual rate of \$50 per ad.<sup>294</sup>

One notable change was made to the substantive rules governing lawyer advertising. A new rule provides that all required disclosure statements<sup>295</sup> must appear in each language used in the particular ad.<sup>296</sup>

Although a lawyer's marketing efforts are usually aimed at acquiring new clients, ethics issues can arise when lawyers leave firms and attempt to take existing firm clients with them. In *Smith v. Bateman Graham, P.A.*,<sup>297</sup> a lawyer who was leaving a firm mailed letters urging certain firm clients to come with him to his new practice. Attempting to stop what it viewed as improper solicitation, the firm sought to enjoin the lawyer from further contacts with firm clients on the ground that the lawyer had violated the ethics rules governing direct mail communications to prospective clients.<sup>298</sup> The circuit court entered the injunction. On appeal, the first district dissolved the injunction on the grounds that the firm lacked standing to seek private enforcement of a bar ethics rule.<sup>299</sup> Without addressing the merits of the firm's allegations, the court held that violation of the RPC or of a

294. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272 (Fla. 1996) (amending RPC 4-7.5(d)(4)).

295. The Rules of Professional Conduct mandate that certain disclosure statements or information appear in various lawyer advertisements. For example, many ads must include these sentences: "The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience." RPC 4-7.2(d). Also, the first sentence of all direct mail communications concerning a specific matter must be: "If you have already retained a lawyer for this matter, please disregard this letter." RPC 4-7.4(b)(2)(G).

296. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272, 283 (Fla. 1996) (adding RPC 4-7.2(r)).

297. 21 Fla. L. Weekly D947 (1st Dist. Ct. App. Apr. 19, 1996).

298. The firm alleged that the letters violated subdivision (b)(1)(B) of rule 4-7.4, which provides:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

....

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter[.]

RPC 4-7.4(b)(1)(B) (1987).

299. *Smith*, 21 Fla. L. Weekly at D947.

Professional Ethics Committee advisory opinions does not provide an adequate basis for instituting a private cause of action.<sup>300</sup>

## VI. THE LAWYER AS A FLORIDA BAR MEMBER

Lawyers move in and out of various roles during their practice, but their role as a member of The Florida Bar remains constant. Membership in the bar carries with it a number of duties as spelled out in the *Rules of Professional Conduct*. Lawyers who fail to fulfill these ethical obligations, especially when their actions cause harm to clients or others, face disciplinary sanctions ranging from admonishment to disbarment.<sup>301</sup>

One of the most common allegations appearing in grievance complaints filed with Florida Bar is that a lawyer neglected the client or the client's case. In *Florida Bar v. Rolle*,<sup>302</sup> a lawyer with serious problems in these areas received a ninety-one day suspension from the practice of law. Similarly, in *Florida Bar v. Morrison*,<sup>303</sup> a lawyer who neglected client matters and who failed to timely respond to investigative inquiries from the bar<sup>304</sup> was suspended for twelve months and thereafter until required restitution was made to an affected client.<sup>305</sup> Another case in which restitution was ordered in connection with a disciplinary suspension was *Florida Bar v. Schramm*.<sup>306</sup> Here, a lawyer neglected client matters and made false statements to a court in connection with a motion to disqualify a judge.

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300. *Id.* at D948. The firm argued that the supreme court's decision in *Chandris* supported its position. See discussion *supra* pp. 260–69. The First District Court of Appeal disagreed, but nevertheless certified the following question to the supreme court as a question of great public importance:

UNDER THE RULE OF LAW ESTABLISHED IN *CHANDRIS*, S.A. V. *YANAKAKIS*, DOES A PRIVATE PARTY HAVE STANDING TO SEEK AN INJUNCTION BASED UPON AN ALLEGED VIOLATION OF THE RULES REGULATING THE FLORIDA BAR?

*Smith*, 21 Fla. L. Weekly at D948 (citations omitted).

301. See generally Chapter 3, R. REGULATING FLA. BAR (addressing "Rules of Discipline").

302. 661 So. 2d 301 (Fla. 1995).

303. 669 So. 2d 1040 (Fla. 1996).

304. Rule 4-8.4(g) provides that a lawyer shall not "fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." RPC 4-8.4(g) (1987).

305. *Morrison*, 669 So. 2d at 1042.

306. 668 So. 2d 585 (Fla. 1996).

Other lawyers had disciplinary problems because they made misrepresentations to courts or while under oath. In *Florida Bar v. Inglis*,<sup>307</sup> a lawyer was found guilty of, among other things, incompetent representation and lying under oath. This lawyer was subsequently disbarred.<sup>308</sup> The misrepresentations at issue in *Florida Bar v. Walker*<sup>309</sup> included both overt false statements and omissions. The supreme court rejected the lawyer's defense that confidentiality obligations precluded him from disclosing information in order to correct the misleading impressions under which both the bar and a third party were operating, stating that "[a]n attorney cannot hide behind attorney-client privilege in order to mislead with impunity."<sup>310</sup> Moreover, the court noted that the attorney-client confidentiality rule contains exceptions permitting the necessary disclosures.<sup>311</sup> A thirty-day suspension was imposed.<sup>312</sup>

False statements filed with the court in a probate matter netted the lawyer a three-year suspension in *Florida Bar v. Segal*.<sup>313</sup> This case is especially interesting because the lawyer attempted to resign from the bar by sending a "resignation" letter to the clerk of the supreme court shortly before the disciplinary hearing on sanctions. The lawyer's resignation letter, of course, was not accepted by the court. In its opinion, the supreme court reminded Florida lawyers that the only method of resignation available to lawyers who are the subjects of pending grievance complaints is a "disciplinary resignation" in compliance with rule 3-7.12.<sup>314</sup>

307. 660 So. 2d 697 (Fla. 1995).

308. *Id.* at 701.

309. 672 So. 2d 21 (Fla. 1996).

310. *Id.* at 23.

311. *Id.* Rule 4-1.6 provides, in pertinent part:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

....

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

....

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

RPC 4-1.6 (a), (c)(4)-(5) (1987).

312. *Walker*, 672 So. 2d at 23.

313. 663 So. 2d 618 (Fla. 1995).

314. *Id.* at 621.

False statements to a court and other deceitful conduct helped earn disbarment for a lawyer in *Florida Bar v. Maynard*.<sup>315</sup> In addition to the various misrepresentations, the lawyer violated conflict of interest rules by improperly engaging in business transactions with clients.<sup>316</sup>

A related form of conflict of interest led to a thirty-day suspension in *Florida Bar v. Marke*.<sup>317</sup> In this case, the attorney allowed his personal interest—which grew out of a business transaction with clients—to affect his representation of clients in related matters. Over time, the lawyer had represented a married couple in forming a corporation and in personal matters. The lawyer prepared an agreement for immediate sale of the corporation, as well as an employment contract between the husband-client and the company (under its new ownership). Later, the lawyer assisted the new owner of the corporation in drafting a letter terminating employment of the husband-client. After formally terminating his professional relationship with the original clients (husband and wife), the lawyer then represented the corporation in disputes arising over agreements that the lawyer had prepared and opposed the original clients in their claims for unemployment compensation.<sup>318</sup>

Lawyers who engage in criminal conduct can expect to receive disciplinary sanctions. This happened to several lawyers in 1996. Disbarment was imposed in cases including *Florida Bar v. Bustamante*<sup>319</sup> and *Florida Bar v. Kushner*.<sup>320</sup> Disbarment without leave to reapply for ten years was imposed

315. 672 So. 2d 530 (Fla. 1996).

316. Rule 4-1.8(a) provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

RPC 4-1.8(a) (1987).

317. 669 So. 2d 247 (Fla. 1996).

318. *Id.* at 248–49. Other cases in which a lawyer's business transactions with clients led to disciplinary problems included *Florida Bar v. Sofu*. See discussion *supra* pp. 236–41, and *Florida Bar v. Clement*. See discussion *infra* p. 277.

319. 662 So. 2d 687 (Fla. 1995).

320. 666 So. 2d 897 (Fla. 1996).

in *Florida Bar v. Lechtner*,<sup>321</sup> a case arising out of the “Operation Court-broom” judicial corruption investigation in Dade County.

Other noteworthy cases related to a lawyer’s role as bar member included *Florida Bar v. Clement*,<sup>322</sup> in which the supreme court addressed a lawyer’s contention that the Americans with Disabilities Act (“ADA”) precluded the imposition of disciplinary sanctions in his case. The court concluded that, while the ADA does apply to The Florida Bar, it does not necessarily bar the Supreme Court of Florida from imposing disciplinary sanctions on a bar member with a disability. A case-by-case analysis of the disabled person and the jobs or benefits he or she seeks is required.<sup>323</sup> *Florida Bar v. Poe*<sup>324</sup> was interesting because of the supreme court’s decision *not* to discipline the lawyer. The lawyer had been sanctioned by a bankruptcy court, and the bar instituted grievance proceedings against him. The supreme court stated that not every court-imposed sanction is the result of an ethical violation.<sup>325</sup> In a concurrence filed in *Landry v. State*,<sup>326</sup> a criminal case, two justices of the Supreme Court of Florida called for increased imposition of professional discipline against lawyers and judges whose lack of sufficient competence causes harm to the judicial system (e.g., through incompetence that results in costly delays in the rendering of justice).

Finally, it was clear that persistence does not always pay. In *Florida Bar v. McAtee*,<sup>327</sup> a lawyer who continued to practice law despite being suspended from practice by the supreme court was disbarred. A lawyer who persisted in practicing after being disbarred was ordered *permanently* disbarred in *Florida Bar v. Neely*.<sup>328</sup>

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321. 666 So. 2d 892 (Fla. 1996).

322. 662 So. 2d 690 (Fla. 1995).

323. *Id.* at 700.

324. 662 So. 2d 700 (Fla. 1995).

325. The supreme court stated:

[w]e disagree with the Bar’s claim that because [the lawyer] was sanctioned in federal bankruptcy court he must have violated the Bar’s disciplinary rules. The sanction is minor: [the lawyer] and [the lawyer’s client] must pay [the client’s ex-wife]’s fees and costs in defending against the petition. Courts commonly award fees and costs in actions arising from a dissolution of marriage [footnote omitted], but this does not mean that the other party is automatically guilty of committing ethical violations.

*Id.* at 704.

326. 666 So. 2d 121 (Fla. 1995) (Wells, J., concurring).

327. 674 So. 2d 734 (Fla. 1996).

328. 675 So. 2d 592 (Fla. 1996).



## VII. CONCLUSION

Florida lawyers fill many roles as they engage in their daily practice of law. Lawyers act as advocates, fiduciaries, officers of the court, and businesspersons, all within the framework of membership in The Florida Bar. It is imperative that lawyers be aware of the specific ethical obligations that they assume when they step into each of these roles. Failure to understand and honor these professional responsibilities can lead to disciplinary exposure and malpractice liability. This article has summarized important 1996 professional responsibility developments that may affect lawyers as they carry out their diverse duties in an ever-changing legal landscape.